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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent,

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS WESTERN ADDITION COMMUNITY ORGANIZATION, et al.

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that minority employees' peaceful leafletting activity

opposing employment discrimination is entitled to protection under the National Labor Relations Act even though the employer is party to a collective bargaining agreement.

STATEMENT OF THE CASE

A. Statement of the Facts

On November 11, 1968, Tom Hawkins and Jim Hollins, two black employees of a department store, were discharged because they twice had distributed leaflets protesting racial discrimination by their employer (Pet. App., p. 10).[1] Each had been employed as a stock clerk by The Emporium, a large chain of department stores in the San Francisco, California area, Hawkins since June 1966, Hollins since November, 1967, at the company's downtown store. Stock clerks at that store were represented for collective bargaining purposes by the Department Store Employers Union ("Union") (Pet. App., p. 3). Both men were members of respondent Western Addition Community Organization ("W.A.C.O."), a predominantly black civil rights group in San Francisco.

By early spring of 1968, Hawkins, Hollins and a number of other minority employees at The Emporium had become acutely aware of the company's employment discrimination against minorities and determined to try to eliminate it (Pet. App., p. 4). Their initial step was to bring the problem to their

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[1] "Pet. App." refers to the appendix to the petition in No. 73-696. "A." refers to the separate appendix filed in this Court. All dates referred to in this Brief are in 1968 unless otherwise noted.

Union's attention in order to secure the Union's assistance (Pet. App., pp. 3-4). Thus, on April 3, about 15 minority employees met with Union agents, described specific instances of employment discrimination at The Emporium and asked for appropriate Union action. *Ibid.* As the Union's chief executive officer, Walter Johnson, later testified, "it was the general concensus of the opinion that of those present that there were less opportunities for those who were in the minority race, not only Negroes, but we had Filipinos and all different groups represented" (Pet. App., p. 4; A. 73).

After at least one other meeting of minority employees and Union officials,[2] the Union drafted, approved and sent to The Emporium (and to the company's multi-employer bargaining representative, the San Francisco Retailers' Council), a report which constituted "the official position of the Union that there was racial discrimination at The Emporium" (Pet. App., p. 4). The report, dated April 11, described the meetings which the Union had held with its minority members working at The Emporium, mentioned several unrelated problems at the store, and then stated, "Probably the most important matter raised was the possibility of racial discrimination" (A. 111). The

[2]There is some confusion in the record as to the number and dates of meetings which were conducted before the Union's report was sent. The report itself mentions two meetings (A. 108) and then refers to "additional meetings" (A. 113). Hawkins testified that he "made a grievance" (A. 22) and then attended a Union meeting on April 4. *Ibid.* Hollins testified to a meeting with Union agents in a cafeteria (A. 57-58). The chief Union agent recalled a meeting on April 3 (A. 73), a second meeting shortly after (*Ibid.*), and a third in May (A. 74).

report explained "that most of the minority people were disgusted . . . . They feel that they are entitled to more than a job; that they should have the same opportunity to advance as other employees do" (A. 112). The report also recounted in some detail the instances in which minority employees had been deprived of an opportunity to advance to higher positions. *Ibid.*[3]

Unfortunately, the Union report failed to produce results of any kind to eradicate the racial discrimination at The Emporium (A. 22).[4] Accordingly, in September, the minority employees convened still another meeting, this time at the Union hall, and brought with them their own representatives: an official from the California Fair Employment Practices Commission ("F.E.P.C.") and an advisor from the Economic Opportunity Council of San Francisco ("E.O.C."),[5] the city's anti-poverty program (Pet. App., p. 5; A. 26, 58, 74, 83). Hawkins explained that he requested the E.O.C. advisor to assist them at the September 3 meeting because "being a black man he would know the problem of when you say discrimination" (A. 26).

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[3]Joint Exhibit 1A, The Emporium's Employer Information Report, Form 330-1, documents the pattern of minority employment for this period (A. 120). The EEO-1, prepared for submission to the U.S. Equal Employment Opportunity Commission on April 24, 1968 (A. 89), shows the positioning of minorities to which the Union's April 11 report refers.

[4]While Union agent Johnson testified that a meeting was held with the Retailers' Council (A. 78), it does not appear that the minority employees attended, or even knew about, the meeting.

[5]Not to be confused with the United States Equal Employment Opportunity Commission.

This meeting, like those held five months earlier, was devoted to a discussion of the problem of racial discrimination at The Emporium (Pet. App., p. 5; A. 59). Again, the Union stated that it wished to do something to remedy the discrimination; however, the Union chose to implement the collective bargaining contract's dispute procedures,[6] and it proposed to do so by presenting a series of individual grievances for separate consideration and resolution (Pet. App. p. 5).

Since this proposal to treat grievances individually would not eliminate the systemic racial discrimination practiced at The Emporium, it was found totally unacceptable by the minorities (Pet. App., p. 6; A. 27). As Hawkins testified, "we felt that like if we talked as individuals well, they could only have a few cases, they would satisfy a few" (Pet. App., p. 7, n.12; A. 27). Thus, in addition to feeling that "the Union was sort of putting us off and on and was going into a lot of delay that we felt was unnecessary" (A. 26), the minority employees had fundamental disagreement with the Union's inability to deal with the racial discrimination as a "group matter" (Pet. App., p. 7; A. 27). Hollins testified, "there was a lot of brown, yellow and black people and red

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[6]The collective bargaining contract contained a non-discrimination provision, §21, a ban on strikes and lockouts, §36A, and a procedure for consideration of "all complaints and disputes arising from the terms of this agreement," §36B (A. 101-103). The procedures involved, first, submission to an adjustment board with three members from the Retailers' Council and three from the Union, and, secondly, if the matter remained unresolved, permission to resort to arbitration, §36B-F. *Ibid.*

people that had a lot of grievances on conditions" (A. 27). Accordingly, they requested the Union to seek redress of the broad question of all phases of discriminatory treatment of all minority employees (Pet. App. p. 26; A. 32-33). The Union, nonetheless, refused to proceed on a "group" basis, and the day after this employees' meeting, the Union, on September 4, formally requested a meeting of the adjustment board to consider its pending "individual" complaint (Pet. App., p. 26; A. 119).[7] Six weeks later, on October 16, the board finally convened (A. 33).[8]

Despite their disagreement with the Union's insistence upon representing only individual instances of discrimination, at least eight minority employees attended the adjustment board meeting (A. 75). When it became clear that the Union would persist in presenting individual grievances separately (A. 60), Hollins said "that we didn't want to have our cases taken

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[7]The lower court's opinion sets out part of the Union's letter requesting the adjustment board meeting (Pet. App., p. 6). However, an earlier portion of that letter characterizes the subject grievances as "matters concerning our members employed in the stock and marking areas" (Pet. App., p. 83), the department in which both Hollins and Hawkins worked. Thus, the Union intended to confine the scope of the adjustment board grievances to employees in only one department in one store in The Emporium chain and viewed the employees' complaints as individual, not class, grievances.

This severely limited scope, as proposed by the Union, is all the more anomalous in light of the Union's statement in its September 4 letter to The Emporium that "we have approximately 120 pages of testimony, recorded by a court reporter, to substantiate" the allegations of racial discrimination (A. 119).

[8]There were two meetings of the adjustment board, on October 16 and 18 (A. 33-34), and the record is unclear as to which statements were made at which meeting.

as an individual thing . . . . [W]e all wanted it taken as a whole for the entire betterment of the minority groups of black, brown, red and yellow people there at the store" (Pet. App., p. 7, n.12; A. 67). He told the adjustment board members "that we didn't want to stay for the meeting that we didn't feel like the meeting was really representing us because they wanted to take our case as an individual thing and we were fighting it as a whole, not an individual case" (Pet. App., p. 7; A. 60). Subsequently, four minority employees—Hawkins, Hollins, Ron Epps and Carlton Washington—left the meeting (Pet. App., p. 8; A. 60).

At about this same time, mid-October, Hollins attempted to talk directly with Mr. Batchelder, president of The Emporium, about the racial discrimination at the store (Pet. App., p. 8).

> I just went up and I told him, Mr. Batchelder, that is, I said, "I want to talk about a situation that I felt should be discussed about things that were happening among minority employees at the store." He said that he didn't want to talk. He told me that Mr. Henderson took care of problems like that (A. 65).

In fact, Hollins previously had spoken with Henderson, company personnel director, about discrimination at The Emporium; the conversation had been totally unproductive (Pet. App., p. 8; A. 64-65).

Six months having passed with no progress toward the elimination of the discrimination, Hawkins, Hollins, Washington and Epps held a press conference

on October 22, at the Sun-Reporter Building in San Francisco (Pet. App., p. 8; A. 9). The black employees read a statement, substantially similar to the leaflet they would later distribute (see *infra*) and told the media reporters about The Emporium's racially discriminatory policies. They said that they were attempting to talk to "the top management" to get better conditions for minorities, and that they were "possibly going to hold a boycott of The Emporium" (Pet. App., p. 8; A. 10-11, 37).

On Saturday, November 2, the four black employees distributed leaflets at the entrances to The Emporium (Pet. App., p. 9).[9] As Union chief Johnson testified, "At particular times throughout the summer, they wanted something dramatic" (A. 81). In fact, at the September 3 Union meeting, after months of

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[9]The leaflets contained the following message (Pet. App., p. 9; A. 105):

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON!!!

For years at the Emporium black, brown, yellow and red people, have worked at the lowest jobs, at the lowest levels. Time and time again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at The Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout The Emporium.

We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute.

inattention to their rather massive complaints[10] of racial discrimination, "there were some frustrations exhibited about the situation" (Pet. App., p. 6; A. 81). Thus, there was a conversation at that meeting between Johnson and Hawkins, with the other minority employees present, during which the suggestion was made that the Union and the Union members picket The Emporium. *Ibid.* In response, Johnson said the Union—because of its contract—could not do so. But, as he testified at the hearing, he did not "at any time . . . warn or instruct the employees not to engage in any activity on their own." *Ibid.* To the contrary, "we informed them that we had a contract, we couldn't participate in any boycotting activities, [but] that individuals could take whatever action they wanted to as long as it was legal." *Ibid.* On cross-examination, Johnson was specifically asked:

> Q. When you say that these things were pointed out, did you specifically tell the employees who were present that they could take whatever action they wanted to?
>
> A. Yes. I said that an individual has the right to take action, but a Union could not (A. 81).

Even more pointedly, advisor Scott from the Economic Opportunity Council of San Francisco told the employees that the situation already "was beyond the picketing stage" (A. 82). And, while Johnson encouraged the minorities to follow the Union's arbitration

[10]Johnson estimated that about 40 Emporium employees had attended the April Union meeting (A. 77). Union agent Griffin testified that virtually every employee who came to the September meeting related "some sort of discrimination going on in The Emporium" (A. 85).

procedure and said that he would not participate in any "drama," he expressly advised the minority employees that "if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals" (Pet. App., p. 6; A. 83).[11]

The leaflet distribution was conducted peacefully, quietly,[12] without blocking or disturbing shoppers, without criticism of the store's merchandise or services, from 9:30 a.m. to 6:00 p.m. on Saturday, an off-duty day for the employees (Pet. App., p. 9; A. 12-14, 45-47). The following Thursday, November 7, Hawkins and Hollins were summoned separately to the office of the company's personnel director, told not to distribute leaflets again, advised that they could be fired if they did, and handed warning notices[13]

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[11]The Union's account of its advice—that, as individuals, Hollins and Hawkins were at liberty to undertake individual action in support of their objective—wholly supports respondents' description of these facts. See Statement of Facts in Amicus Curiae Brief of Department Store Employees Union, Local 1100, pp. ..... (August, 1974).

[12]Hawkins admitted that he did raise his voice in response to people who called him "nigger", "Communist" and other "fictitious names" because he did not want to destroy his self-respect (A. 13-14). Similarly, Hollins raised his voice once when a lady asked him why he didn't go back to Africa (A. 47).

[13]Hollins warning stated:

> On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.
>
> On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.
>
> These statements are untrue and are intended to and will, if continued, injure the reputation of The Emporium.
>
> There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activi-

(Pet. App., p. 10; A. 14-15, 45-50). Nevertheless, that Saturday, November 9, Hawkins, Hollins, and a few other minority employees distributed virtually identical leaflets, at the same places, during the same hours, in the same manner as the week before (A. 15-17, 50-51). During the leafletting, Johnson spoke to Hollins and repeated the suggestion that contract grievance procedures be pursued (Pet. App. 9-10). He cautioned that Hollins and Hawkins might be jeopardizing their jobs and expressed the concern that "I didn't want to see them get fired" (*Ibid.*; A. 76).

On Monday, November 11, Hollins and Hawkins were summoned again to the company's personnel office, and each was given a notice of termination stating "You are being discharged today. Distribution of 'Boycott Emporium' literature on Saturday, November 9, 1968 in front of The Emporium, 835 Market Street, S.F. pursuant to written warning dated 11/7/68 for similar action on 11/2/68" (Pet. App., p. 10; A. 17-18, 51-52). Johnson, acting on behalf of the Union, immediately filed a grievance with the Retailers' Council protesting Hawkins' and Hollins' discharges (Pet. App., p. 10; A. 76).

B. Proceedings Before the N.L.R.B.

On November 19, W.A.C.O. filed an unfair labor practices charge (A. 93) with the National Labor

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ties as a deliberate and unjustified attempt to injure your employer.

This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement (Pet. App., p. 10, n. 17).

Hawkins' warning did not contain the first paragraph but was otherwise identical (A. 106).

Relations Board ("N.L.R.B."), alleging that The Emporium's discharge of Hawkins and Hollins violated Section 8(a)(1) of the National Labor Relations Act ("Act"), as amended, 29 U.S.C. §§151, *et seq.* (Pet. App., p. 11). Complaint issued on March 4, 1969 (A. 94-96), and a hearing was conducted on April 8, 1969 (Pet. App., p. 11).

The Board's Trial Examiner, in his decision dated October 20, 1969 (Pet. App., pp. 78-106), found—and all parties agree—that Hawkins' and Hollins' protest was grounded in a good faith belief that employment discrimination existed at The Emporium (Pet. App., pp. 11, 96).[14] He also found the employees' activities to be "concerted" under the Act, but undeserving of statutory protection because they were "inconsistent with and disruptive of" the union-management relationship and contract (Pet. App., p. 94). Accordingly, he recommended that the complaint be dismissed (Pet. App., p. 106).

A three-member majority of the Board summarily adopted the Trial Examiner's findings, conclusions and recommendation to dismiss the complaint (Pet. App., pp. 54-55). Two Board members, Jenkins and Brown, filed extensive and strenuous dissents (Pet. App., pp. 56-77).

Board member Brown focused his dissent upon—and rejected—the Trial Examiner's finding that Haw-

[14]The issue of discrimination in fact was not proved because the case was tried by the N.L.R.B.'s General Counsel on the theory that only a good faith belief that discrimination existed was necessary to establish protection under the Act for Hawkins' and Hollins' activities (Pet. App., p. 91).

kins and Hollins, in fact, had demanded that the company bargain with them "for the entire group of minority employees on terms and conditions of employment" (Pet. App., p. 75).

> There is not a scintilla of proof that the picketing employees wanted discussions leading to agreements on new conditions of employment, or even a modification of existing ones, or even to effect a compromise of the grievances. In short, the employees did not picket Respondent for the purpose of negotiating an agreement . . . (Pet. App., p. 76-77).

Instead, Brown viewed the employees' purpose to be no more than submission of a grievance concerning racial discrimination, a condition which the company was bound by law to correct. *Ibid.* He concluded that Section 9(a) of the Act plainly encompassed the employees' purpose, that their actions did not undermine or derogate rights of collective bargaining and that there was no justification for Hawkins' and Hollins' discharges (Pet. App., pp. 76-77).

Board member Jenkins agreed that the discharged employees' purpose had been simply to present a grievance and was therefore protected within the Section 9(a) proviso (Pet. App., p. 58, n.4).[15] But the principal thrust of Jenkins' dissent was directed to the Trial Examiner's finding that the minority

[15]Nor did Jenkins accept the Trial Examiner's finding that the Union had endeavored "in every way available to it under the agreement to adjust any and all cases of racial discrimination . . . ." To the contrary, the Union's delay and inactivity contributed to Hawkins' and Hollins' determination to protest as they did (Pet. App., p. 69, n.7).

employees' activities had been in derogation of the Union's status, had undermined the concept of exclusivity and had improperly burdened the company (Pet. App., pp. 57-58). Jenkins rejected the possibility that concerted protest against employment discrimination loses the Act's protection simply because the union and management have included a non-discrimination clause in their contract. Nor, he wrote, does a union fully discharge its duty to eradicate discrimination simply by taking a position against "some" discrimination:

> If a union position in favor of the elimination of *some* but not all racial discrimination can foreclose concerted employee activity to remove *all* racial discrimination, collective bargaining on this subject is converted from a shield protecting employees against racial discrimination into a sword by which such protection can be cut down or cut back (Pet. App., pp. 65-66) (emphasis in original).

C. The Court of Appeals' Decision

The U.S. Court of Appeals for the District of Columbia Circuit concluded "that the Board's decision that these concerted activities were not protected by the Act is not supported by substantial evidence in the record and must be reversed" (Pet. App., p. 18).[16]

[16]The case was remanded solely for the Board's consideration of the disloyalty issue (Pet. App., pp. 19, 29-31) which neither the Board nor Trial Examiner had decided (Pet. App., pp. 11, 29-30, 97-101). In fact, as Senior District Judge Wyzanski concluded, the disloyalty issue was not properly preserved in view of the Board's failure to ground its action upon possible disloyalty. Accordingly, he did not join in the remand but would simply have ordered the Board to grant the relief sought by the complaint (Pet. App., pp. 51-53).

The court's analysis began with the proposition that the right of an employee to be free from racially discriminatory treatment emanates from the overriding "national labor policy which unequivocally rejects racial discrimination in employment" (Pet. App., p. 13). Section 7 of the Act not only encompasses this paramount right, the court recognized, but accords it a substantially higher priority than other Section 7 rights (*Id.* at 19, 22). The need to recognize this priority is reinforced by Section 704(a) of Title VII which "precludes an employer from discharging employees in retaliation for peaceful picketing of the employer's business in protest of allegedly discriminatory racial practices" (*Id.* at 20).

With these considerations in mind, the court found the employees' concerted activities to have caused only slight, if any, interference with Section 9(a) principles: first, because the Union could not lawfully tolerate even "some" discrimination; secondly, because Hawkins and Hollins had first sought to utilize the collective bargaining process;[17] and finally, because the minority employees and the Union, in fact, had not been working at cross-purposes (*Id.* at 22-26).[18]

The court concluded that, in cases involving racial discrimination, unless the Union "was actually remedying the discrimination to the *fullest extent possi-*

[17]The court thus attempted to preserve for the grievance-arbitration procedures "an important role in remedying racial discrimination in employment" (Pet. App., p. 25).

[18]The "wildcat" strike cases were thus distinguished by the court. (Pet. App., pp. 16-18, 26).

ble by the most expedient and efficacious means," the Union's methods or intentions cannot serve to restrict minority employees or to take away their Section 7 protection (*Id.* at 28) (emphasis in original). Any other result would permit an employer to use Section 9(a) as a shield to avoid its duty to eliminate racial discrimination (*Id.* at 29).[19]

SUMMARY OF ARGUMENT

This case presents for review the Court of Appeals' decision reconciling and accommodating two different statutes, enacted at different times in response to different problems, but both designed to effectuate a single federal labor policy. The National Labor Relations Act prohibits discrimination against employees based upon their exercise of the right of self-organization, including self-organization for the purpose of opposing racial discrimination in employment. Title VII of the 1964 Civil Rights Act addresses itself more comprehensively to the problem of racial discrimination. Still, both statutes are but different statements of a cohesive national policy.

Thus, the court below realized that, even though this case involves an issue raised under the Labor Act, that Act should not be viewed in isolation. Any

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[19]Judge Wyzanski filed a separate opinion in which he rejected the majority's use of a balancing test to accommodate the principles of Section 7 and Title VII, on the one hand, and Section 9(a), on the other. Instead, he would find that Section 9(a) exclusivity was never intended to curtail minority employees' efforts to eliminate racial discrimination. Thus, based upon legislative history, statutory and constitutional law, and policy, he believed Section 9(a) simply inapplicable (Pet. App. pp. 41-51).

other approach fails to recognize, first, the strong thrust of the national labor policy unequivocally to reject racial discrimination in employment and, secondly, the Board's clear obligation to administer the Labor Act within the framework of this broader national policy. Having adopted this perspective, the court was able to apply the proper principles to the facts of this case in a manner that balances and amply accommodates the objectives of the two statutes.

Whenever a court adopts a balancing test, it is possible to discern risks and evoke speculations. The facts of this case, however, do not readily lend themselves to such treatment. Tom Hawkins and Jim Hollins, two young, black stock clerks, were discharged by The Emporium because they had distributed leaflets protesting the store's racially discriminatory employment practices. They had good reason to believe there was discrimination: they personally had suffered from it; their fellow minority employees had confirmed it, and their Union had announced as its official position that the company engaged in discriminatory practices.

Hawkins and Hollins first turned to their Union for appropriate action but, after seven months, it was clear that the Union, for whatever reason, would not furnish a realistic remedy to their problem. The employees' direct approaches to management were rebuffed as well. Refusing to abandon their goal of equal employment opportunity, however, Hawkins and Hollins took independent action and, consequently, were discharged.

Federal labor policy generally favors, and Section 704(a) of Title VII expressly protects, the employees' protest in opposition to employment discrimination. Their protest consisted simply of distributing leaflets, peacefully, lawfully, and on their own time to passers-by whose entrance to The Emporium was in no way hindered. The Union had been asked, but declined, to participate in the leafletting, although Hawkins and Hollins were advised that they, as individuals, were free to engage in any such lawful activity. As the Union's *amicus curiae* brief makes clear, the Union in so advising the employees recognized that—contrary to the petitioners' contentions—the two minority employees were not seeking to establish separate collective bargaining for a discrete unit of employees.

The numerous Congressional expressions of the national labor policy against employment discrimination, of which Title VII is the most recent articulation, form the context in which the N.L.R.A. must be administered. In any case, the Act, as construed by the courts and the Board, independently rejects racial discrimination in a variety of circumstances. There would be grave constitutional questions if it did not.

The lower court recognized, of course, that, where there is an exclusive bargaining agent, some employee action is prohibited by Section 9(a) of the Act. That section reflects the labor doctrine that unions can best serve their employees and that union-management stability can best be assured when employee factions are not permitted to bargain against each

other and when employers are not free to divide and conquer their employees.

Hawkins' and Hollins' conduct did not contravene Section 9(a). They were discharged because they leafletted; they leafletted because racial discrimination at The Emporium persisted, despite their earnest efforts to engage both union and management in its elimination. The two employees had waited for seven months for their union to act; they had attempted to utilize the union-management grievance mechanism. When, eventually, they abandoned the Union, they did so to compel their employer to cease discrimination where they worked. Section 9(a) principles are not applicable to these facts.

Whether the employees' objective be deemed a demand for parity—that minorities as well as whites might enjoy equal employment opportunity—or simply as the presentation of a grievance, it is at least certain that they did not seek collective bargaining for the purpose of negotiating an agreement establishing terms and conditions of employment for a unit of employees. They did not seek to compete with or undercut the Union. Certainly the Union, which continues to support the employees before this Court, did not feel threatened. Nor can the employer's slight inconvenience—in being met by employee protest against discrimination—justify the employees' discharges, for, even without their request, the company was lawfully bound to eliminate, unilaterally if necessary, racially discriminatory employment practices. Neither the Union's existence, its exclusive

representation status nor the presence of a non-discrimination clause in the collective bargaining agreement adds anything to the employees' statutory rights to seek the eradication of discrimination. This being so, neither should these factors deprive the employees of their otherwise plainly protected objective and method of protest.

It is now well settled that, where such paramount rights are at stake, the availability of one remedy does not foreclose another. Thus, recourse to the N.L.R.B. is not precluded by the existence of alternatives. Moreover, after *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), it is now equally clear that had the minority employees sought their remedy under Title VII, that Act would have afforded them appropriate protection. To thus deny them relief in this case can only mean that the N.L.R.A. affords them no such protection. Similarly, at least in the area of employment discrimination, the election of remedies doctrine has no applicability, nor should it, in light of the substantial disadvantages of available options. Finally, affirmance of the decision below will serve both to endorse N.L.R.B. involvement in this area, a process which the Board itself recently has accelerated, and, at the same time, to encourage management and union responsiveness to minority claims, thereby promoting industrial stability.

ARGUMENT

Since this case concerns the proper role to be assumed by the National Labor Relations Board in effectuating the federal labor mandate to eliminate racial discrimination in employment, the argument in this brief will first describe the interests to be balanced: the policy to eliminate discrimination, its various Congressional expressions, and the principles of accommodation. Next, this accommodation of interests will be applied to the particular facts in this case. That section of the brief will demonstrate the efficacy of the Court of Appeals' standard for the balancing of those interests, a standard which reflects a careful effort to engage the Board in the elimination of employment discrimination without, at the same time, disregarding other important labor law principles. Finally, this brief will analyze the result of this application in terms of the policy ramifications it promotes.

I. THE NATIONAL LABOR RELATIONS ACT INDEPENDENTLY, AND AS PART OF THE NATIONAL LABOR POLICY, REJECTS UNEQUIVOCALLY RACIAL DISCRIMINATION IN EMPLOYMENT.

As the court below recognized, the National Labor Relations Act independently prohibits racial discrimination in employment. Still, this statutory objective becomes even clearer with recognition of the overall national labor policy—to assure equality of employment opportunity by eliminating discriminatory practices and devices, *e.g., Alexander v. Gardner-Denver Co.*, 94 S.Ct. 1011, 1017 (1974)—and of the Act's proper relationship to that policy.

Congress has consistently indicated that the policy against discrimination be considered of the "highest priority," not only by successive legislation, but also by the determination that such enactments afford "parallel or overlapping remedies against discrimination." *Id.* at 1019.[20] Congressional action in this area has been paralleled, and often elucidated, by the decisions of this court. *E.g., Alexander v. Gardner-Denver Co.*, 94 S.Ct. 1011 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944);[21] *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Truax v. Raich*, 239 U.S. 33, 41 (1915).

The *New Negro Alliance* case demonstrates this Court's determination not only to prohibit racial discrimination in employment, but to protect lawful protest opposing such discrimination. Under circumstances strikingly similar to the case at bar, Negroes in that case sought, and management refused to provide, equal employment opportunity. Orderly picket-

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[20] *E.g.*, 42 U.S.C. §1981 (discrimination in private employment); 42 U.S.C. §1983 (discrimination in public employment); Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e, *et seq.*; and the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§2000e, *et seq.* (as amended).

[21] The *Steele* decision heralded a long, consistent line of authority to assure fair representation by a union of all those whom it is chosen to serve. Decisions enforcing this duty of fair representation have proliferated, both under the Railway Labor Act, 45 U.S.C. §§151, *et seq.* (*e.g., Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324 (1969)), and under the National Labor Relations Act, 29 U.S.C. §§151, *et seq.* (*e.g., Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)).

ing ensued, with a placard reading "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" *Id.* at 559. In holding that the Norris-La Guardia Act, 29 U.S.C. §§101, *et seq.*, covered and protected the pickets, this Court stated, in words of great applicability to the present case: "Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation." 303 U.S. at 561.

The steady thrust of this Congressional and judicial action has engendered a recognition that the N.L.R.A. itself prohibits racial discrimination in employment. Thus, it is now well settled that a union's breach of the duty of fair representation not only is actionable under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, but also constitutes an unfair labor practice in violation of Section 8(b) of the N.L.R.A., 29 U.S.C. §158(b). *Vaca v. Sipes*, 386 U.S. 171 (1967); *United Packinghouse Workers Union v. N.L.R.B.*, 416 F. 2d 1126 (D.C. Cir.), *cert denied*, 396 U.S. 903 (1969). *Accord, N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965); *Pacific Maritime Assoc.*, 209 N.L.R.B. No. 88 (March 8, 1974); *Washington State Service Employees State Council No. 18*, 188 N.L.R.B. 957 (1971).[22]

[22]The Board has examined racial discrimination in a different context, as well: that of the conduct of representation elections. Thus, the N.L.R.B. has found a violation of the Act where an employer made flagrant appeals to racial prejudice in the course of a union election campaign. *E.g., Sewell Manufacturing Co.*, 138 N.L.R.B. 66 (1962).

Most recently the Board, in a striking departure from past practice, has decided that, where a union which has won a certification election is charged with engaging in invidious discrimination, the Board will conduct an inquiry and, in appropriate cases, deny certification. *Bekins Moving & Storage Co. of Florida, Inc.*, 211 N.L.R.B. No. 7 (June 11, 1974). This stance was adopted, the Board said, in light of the constitutional, as well as statutory, imperative not to tolerate "any forms or practices of discrimination. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948)." *Id.* at p. 4 of slip opinion.

Unfortunately, in the instant case, as the Court of Appeals below pointed out, neither the Board nor its Trial Examiner took cognizance of the N.L.R.A.'s own prohibition against racial discrimination in employment (Pet. App., p. 12). Instead, the Trial Examiner (and the Board majority, by its silence) totally disregarded both the compelling sweep of the national policy to eliminate discrimination and the Act's proper relationship to that policy. Thus, the Trial Examiner commented:

> (Parenthetically, it is noted that as adjudicators under the Act we do not belong in the contemporary civil rights struggle. Congress did not put us there.) Pet. App., p. 101.

This parenthesis represents the ultimate expression of excessive fidelity to administration of the Act. But fidelity to the Act, this Court has taught, requires recognition of the broader national policies within

which it is to be administered. This point was forcefully made in *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942), a case heavily relied on by the lower court (Pet. App., p. 21). As this Court stated in *Southern Steamship:*

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task. 316 U.S. at 47.[23]

The legislative history strongly supports the lower court's conclusion that Congress intends the N.L.R.B. to give effect to the broad national labor policy, including the elimination of racial discrimination. The lower court's conclusion was recently confirmed by this Court in *Alexander v. Gardner-Denver.*[24] Thus,

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[23]As Board member Jenkins observed in his dissenting opinion in this case, "[t]he Act we administer must be read consistently with other Federal statutes which established the national labor policy. *Textile Workers Union of America, AFL-CIO v. Lincoln Mills*, 353 U.S. 448, 456-458" (Pet. App., p. 71). *Cf., McLean Trucking Co. v. United States*, 321 U.S. 67 (1944): "But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter." 321 U.S. at 79-80.

[24]As this Court noted in *Alexander v. Gardner-Denver*, 94 S.Ct. 1011, 1019-1020, n.9:

> For example, Senator Joseph Clark, one of the sponsors of the bill, introduced an interpretive memorandum which stated: "Nothing in Title VII or anywhere else in this bill affects the

the Congress and the courts have insisted that this Act provide an effective remedy for racial discrimination in employment. Such insistence recognizes that racial discrimination prevents the realization of employee rights to engage in "concerted activities" under the Act and, hence, hinders the goals of effective union-management relations and industrial stability.

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rights and obligations under the NLRA or the Railway Labor Act . . . . Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other federal and state statutes. If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 110 Cong. Rec. 7207 (1964). Moreover, the Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices. 110 Cong. Rec. 13650-13652 (1964). And a similar amendment was rejected in connection with the Equal Employment Opportunity Act of 1972. See H.R. 9247, 92d Cong., 1st Sess. (1971). See also 2 U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess. (1972), pp. 2137, 2179, 2181-2182. The report of the Senate Committee responsible for the 1972 Act explained that [neither] the "provisions regarding the individual's right to sue under Title VII, nor any of the provisions of this bill, are meant to affect existing rights granted under other laws." S. Rep. No. 415, at 24, 92nd Cong., 1st Sess. (1971). For a detailed discussion of the legislative history of the 1972 Act, see Sape and Hart, Title VII Reconsidered: The Equal Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972).

It is of consequence that, by the time of this second enactment of the Equal Employment Opportunity Act of 1972, decisions had held racial discrimination to violate both Section 8(a) (employer practices) and Section 8(b) (union practices) of the Act. *E.g., United Packinghouse Workers Union v. N.L.R.B.*, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969) (§8(a)(1) violation); *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965) (§8(a)(1) violation); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967) (§8(b)(1)(A) violation). And, of course, fair representation cases under L.M.R.A. Section 301 have issued regularly from the courts since 1944.

II. THE MINORITY EMPLOYEES' CONCERTED ACTIVITY WAS ENTITLED TO N.L.R.A. PROTECTION BECAUSE, AS THE RECORD SHOWS, THEIR CONDUCT CONSTITUTED LAWFUL OPPOSITION TO EMPLOYMENT DISCRIMINATION, NOT A REQUEST FOR RECOGNITION AND COLLECTIVE BARGAINING.

Since the N.L.R.A. independently, and as a part of the cohesive national labor policy, rejects racial discrimination in employment, efforts to eradicate such discrimination also warrant protection of the Act. This is particularly true in light of Title VII's express authorization for protest, as well as other efforts, directed at fulfilling the national labor policy to eliminate such discrimination. Indeed, protest—in a form which was substantially more boisterous and disruptive than the conduct in this case—has been found to be protected by Section 704(a) of Title VII. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Similarly, conduct by employees opposing discrimination has been protected under the N.L.R.A. so long as no union was present[25] or, as was true in this case, union processes were not totally disregarded.[26] Because the record demonstrates that the employees' conduct here did not amount to bargaining, their concerted activities are clearly protected by Section 7 of the Act and are not subject to the limitations of Section 9(a) or Section 8(b)(7)(A).

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[25] *E.g., N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965).

[26] See *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969) (no Section 7 protection where employees fail first to seek union assistance to eradicate race discrimination).

A. Section 9(a) Exclusivity Does Not Apply to the Employees' Conduct in This Case.

The exclusivity principle contained in Section 9(a) of the Act intends to insulate unions from the sluicing effect of competing collective bargaining negotiations. *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 684 (1944). Exclusivity embodies the concept that employees can best realize their collective bargaining goals if their representative is free to present and negotiate a single set of demands for all employees. Exclusive representation status protects employees by preventing employers from negotiating with splinter groups or individuals. *Id.* at 685 (1944). Thus, the lower court explained, a primary purpose of Section 9(a) "was to prevent the situation where two or more agreements might be negotiated by splinter groups which treated various factions of the bargaining unit unequally" (Pet. App., p. 15). Exclusivity prevents unequal treatment of similarly situated workers.[27]

Attention to the record in this case discloses that Hawkins and Hollins never contemplated nor took action to which Section 9(a) is applicable. The record is uncontradicted on these facts: first, Hawkins and Hollins believed in good faith that there was racial discrimination practiced at The Emporium which

[27] Exclusivity has never implied unfettered power. Rather, the grant of statutory authority to unions exacts the corresponding "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts . . . ." *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. at 203. In short, Section 9(a), like all other provisions of the N.L.R.A., was intended for the benefit of employees, not unions. *See also, J. I. Case Co., v. N.L.R.B.*, 321 U.S. 332, 338 (1944).

severely disadvantaged all minority employees.[28] Secondly, their objective was to remedy that discrimination for all minorities.[29] Finally, having realized

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[28]This belief, as the Union's official position verified, was well-grounded. The Emporium's EEO-1 report, filed in April, 1968 (A. 120), amply documents this complaint. Thus, there were 1,004 unskilled (laborers and service workers) positions at the company; of these, 285, or 28%, were minority. On the other hand, of 5,175 professional, skilled or semi-skilled positions, only 546 (or 11%) were held by minorities. Only 1 of 47 "white collar" on-the-job trainees was a minority (Negro male). An employees' survey (A. 115-118) further demonstrated that, even in the "selling" positions which were occupied by 10% minority employees, non-whites were restricted to the least remunerative, lowest commission jobs.

This documentation wholly supports the thrust of Hawkins' and Hollins' complaint: that minorities, while hired by the company, were uniformly relegated to low-paying, dead-end jobs, without hope of advancement commensurate with their merit on the job. Evidence like this was offered at the N.L.R.B. hearing not to prove a Title VII case, but merely to establish the employees' *bona fides* in protest (Pet. App., pp. 90-91). Nonetheless, statistical evidence of employment discrimination may establish a Title VII violation, *e.g., Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), or, at the least, make out a *prima facie* case of discrimination, *e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1825 (1973); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970) As this Court stated in *McDonnell Douglas, supra*, 93 S.Ct. at 1825:

> Other evidence that may be relevant to [determining the reason for the employee's discharge] includes . . . the petitioner's [employer's] general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful . . . .

[29]Hawkins and Hollins testified repeatedly of their concern for "brown, yellow, black and red people" (*e.g.*, A. 27) and of their commitment to a solution for all minorities as a group (Pet. App., p. 7). This concern comports with judicial views: "Whether in name or not, the [discrimination] suit is perforce a sort of class action for fellow employees similarly situated." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968). *See also, Huff v. N.D. Cass Co. of Alabama*, 485 F.2d 710, 713 (5th Cir. 1973), ("racial discrimination . . . is by definition class discrimination"); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Georgia Power Co. v. E.E.O.C.*, 412 F.2d 462, 468 (5th Cir. 1969).

the futility of depending upon the union for an effective remedy, the two employees tried to talk to company management: "Hollins went to the Company president requesting that 'they talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store'" (Pet. App., p. 8). Only after Hollins' request was rejected did the protest begin.

Moreover, the record establishes that Hawkins and Hollins were fired because of their conduct in protesting racial discrimination. The record shows that their protest was intended to publicize, and thus to induce response to, their underlying grievance concerning discrimination. Viewed as either protest or grievance, however, their conduct warranted protection under the Act. As the Union in its *amicus curiae* brief more fully develops:

> As a matter of uncontested fact, HAWKINS and HOLLINS were not discharged for any effort to bargain with the Company. Rather, they were discharged for publicly claiming that the Company engaged in racial discrimination. Nowhere in the Company's warning notices, explanations made to the discharged employees, or in the discharge notices is there the slightest suggestion that the discharges were motivated by the employees' independent effort to bargain with the Company. . . . Indeed, with but one exception, the Company was not even aware of any intent to bargain on the part of HAWKINS and HOLLINS when they were fired and nearly all the evidence pertaining to this issue was adduced only

at the Board hearing—long after the discharges [footnote omitted].[30]

Once the employees' activity at issue is characterized as protest—orderly distribution of literature relating to concerted interests—constitutional and statutory considerations demand that the employees be accorded the greatest latitude. *E.g., N.L.R.B. v. Magnavox Co. of Tennessee,* 94 S. Ct. 1099 (1974); *Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793 (1945); *Gale Products,* 142 N.L.R.B. 1246 (1943). Precisely the same latitude must be provided if, on the other hand, the employees' discharges are considered to be based upon the underlying grievance which their protest was designed to publicize. Under either characterization, the record shows that Hawkins and Hollins sought simply to attain that to which they and their fellow minority employees were entitled: the same terms and conditions of employment which whites received. This, and nothing more. The collective bargaining agreement created contract rights;[31] Hawkins and Hollins attempted to achieve realization of these rights for minorities. In a word, the two employees sought "parity" for those, including themselves, to whom it had been denied.

Section 9(a) exclusivity never was intended to prevent employees from seeking that which, by contract,

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[30]Amicus Curiae Brief of Department Store Employees Union, Local 1100, p. ..... (August 1974).

[31]As pointed out in this brief, *infra* in Section III of the Argument, the right to be free from discrimination in employment does not depend upon union-management acceptance of a non-discrimination clause in the collective bargaining agreement.

was their due. The leading case on this issue, *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945), delineates quite precisely the interests which Section 9 (a) safeguards. There, this Court instructed that unions are to be unhindered in "the formation of collective agreements or efforts to secure them." *Id.* at 723. Exclusivity protects unions in their "acquisition of rights for the future." *Ibid.*

Hawkins' and Hollins' Union had negotiated a collective agreement. Its provisions set out the terms and conditions of employment and expressly prohibited discrimination because of race or color. Their Union, however, had been unable to enforce these provisions; their employer had been unwilling. Under these circumstances, the two employees sought not to negotiate new terms of employment, nor to modify pre-existing ones, but simply to achieve what the contract promised them. Section 9(a) premises are simply inapplicable to these facts.[32]

Hawkins' and Hollins' purpose has most accurately been described in the cases distinguishing "bargaining" from a "grievance." Thus, the *Elgin* case describes a grievance as a dispute which "contemplates the existence of a collective agreement already concluded . . . [and] relates either to the meaning or proper application of a particular provision . . . ." 325

[32]The lower court reached this same conclusion on slightly different grounds. The court reasoned that Section 9(a) allows unions to balance and adjust only legitimate conflicting demands. Since the union cannot legitimately tolerate any racial discrimination, the union and minority employees could not be at odds on this point and, therefore, there were no "balances" to be made (Pet. App., pp. 22-23).

U.S. at 723.[33] "[T]he claim is to rights accrued, not merely to have new ones created for the future." *Ibid.*[34]

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[33]The legislative history of the 1947 Taft-Hartley Act, amending the N.L.R.A. (when the Section 9(a) proviso was modified to its present form), indicates Congressional codification of the *Elgin* holding in the current proviso. Thus, bill co-author Representative Hartley confirmed Representative Owens' statement that "under this provision we have gone in accord with the decisions of the Supreme Court of the United States, which hold that where employees have a grievance, for instance in connection with the recovery of a certain amount of money claimed due from an employer, they can go to him and complain about it and settle it without having a bargaining agent." Cong. Rec., House—April 17, 1947 (Vol. I, Leg. Hist. LMRA of 1947, p. 781).

Co-author Senator Taft also explained:

> An amendment contained in the revised proviso for Section 9(a) clarifies the right of individual employees or groups of employees to present grievances. The Board has not given full effect to this right as defined in the present statute. . . . The revised language would make it clear that the employee's right to present grievances exists independently of the rights of the bargaining representative, if the bargaining representative has been given the opportunity to be present at the adjustment, unless the adjustment is contrary to the terms of the collective-bargaining agreement then in effect. Sen. Rep. No. 105, 80th Cong., 1st Sess. 1126 (1947).

Much of this legislative history is discussed in *Illinois Ruan Transport Corp. v. N.L.R.B.*, 404 F.2d 274, 286, n.3 (8th Cir. 1968).

[34]See also *N.L.R.B. v. North American Aviation Co.*, 136 F.2d 898 (9th Cir. 1943), which construed the Section 9(a) proviso even before it was strengthened. That case involved a Board claim that permitting an employer to have "two grievance procedures" would nullify the effect of the collective bargaining agreement. The court responded, "But it may be that the law makers in blazing a course for collective bargaining also had in mind the preservation of the individual right of protest as well as the benefits that logically flow from an understanding between employer and employee." *Id.* at 899-900. The Seventh Circuit has similarly explained that "a grievance under section 9(a) is not necessarily limited to minor matters, but may entail problems arising under a collective bargaining agreement . . . ." *N.L.R.B. v. Kearney & Trecker Corp.*, 237 F.2d 416, 420 (7th Cir. 1956). *See also Hughes Tool v. N.L.R.B.*, 147 F.2d 69 (5th Cir. 1945); *cf., Black-Clawson Co. v. International Ass'n of Mach.*, 313 F.2d 179, 184-186 (2nd Cir. 1962).

The *Elgin* doctrine is reflected in the opinions of the two dissenting Board members. Each of them strenuously criticized the Trial Examiner's conclusion that Hawkins and Hollins had engaged, or attempted to engage, in bargaining within the meaning of Section 9(a). "There is nothing in the evidence," Member Brown noted, to indicate a "purpose to 'negotiate' "; rather, the employees sought to convince the company's president to correct the alleged discriminatory treatment of minority employees as express provisions of the bargaining agreement required (Pet. App., p. 75).

Brown thus viewed the employees' purpose to be simply the presentation of a grievance concerning racial discrimination, a condition which the company, in any case, was bound by law to correct. *Id.* at 76. Board Member Jenkins similarly agreed that the discharged employees' purpose had been merely to present a grievance and was therefore protected within the Section 9(a) proviso (Pet. App., p. 58, n.4).[35]

B. Section 8(b)(7)(A) of the Act Does Not Apply to the Employees' Conduct In This Case.

The government's brief to this Court raises—for the first time at any stage of the litigation—the novel theory that Section 8(b)(7)(A) of the Act may somehow proscribe the minority employees' conduct.[36] While respondents assume that this Court will adhere

[35]Jenkins noted the commonly held black opinion "that only the president or 'boss' of the company can effect permanent solutions to problems involving racial discrimination." *Ibid.*

[36]See Brief for the National Labor Relations Board, pp. 37-40 (June 1974).

to its sound practice not to consider issues which have not been raised, much less discussed, below, we nevertheless show here the utter lack of merit to this assertion.

Regardless of whether Hollins and Hawkins constituted a labor organization under Section 2(5) of the Act,[37] such designation does not ineluctably lead to the conclusion that their activities violated Section 8(b)(7)(A). Section 8(b)(7)(A), by its terms, requires a finding, first, that picketing occurred[38] and, secondly, that "an object thereof is forcing or requiring an employer to recognize or bargain with the labor organization . . . ." But, the case most heavily relied upon by the government—*N.L.R.B. v. Cabot Carbon Co.*[39]—itself demonstrates that not all labor organizations under Section 2(5) pursue a "bargaining" object.

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[37]It is far from certain that Section 2(5) reaches the activities of two employees. They are, at most, a *de minimis* "labor organization". Moreover, it is significant that all of the cases cited by the government construe Section 2(5) in the context of employer interference with employee concerted activity. *Ibid.* The broad reading of the statutory definition served in those cases to protect employees' Section 7 rights. The government urges the opposite result here: that Section 2(5) be construed to proscribe concerted employee activity. It is noteworthy that the government cites no case—nor do respondents know of any—in which two employees have been deemed a Section 2(5) labor organization and their activities prohibited by Section 8(b)(7)(A).

[38]To the contrary, the record is uncontroverted that no picketing occurred in this case. Hawkins and Hollins were discharged because they passed out handbills protesting racial discrimination. As their termination slips stated: "You are being discharged today. Distribution of Boycott Emporium literature on Saturday, November 9, 1968, in front of the Emporium . . . ." (Pet. App., p. 10, n.18). No party to this litigation even suggests that Hawkins and Hollins engaged in any other or different conduct.

[39]360 U.S. 203 (1959), cited in the Brief for the N.L.R.B., pp. 37-38.

"Certainly nothing in that section [2(5)] indicates that the broad term 'dealing with' is to be read as synonymous with the more limited term 'bargaining with.'" 360 U.S. at 211. See also *National Packing Co. v. N.L.R.B.*, 377 F.2d 800, 803 (10th Cir. 1967). Since the mere existence of a labor organization cannot violate Section 8(b)(7)(A), violation of that section thus depends on the nature of that organization's activity.

Both the legislative history of Section 8(b)(7)(A) and the long line of cases construing that provision make clear that the coverage of this section proscribes only organizational and recognitional picketing, not informative picketing designed, for example, to publicize an employer's unfair labor practices. 2 *Leg. Hist. L.M.R.A.*, 1361, 1384, 1429, 1717 (1947); *C. A. Blinne Constr. Co.*, 135 N.L.R.B. 1153, 1168, n.29 (1962); see also A. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 267 (1960).

Even assuming, *arguendo*, that Hollins and Hawkins were a labor organization and that they had engaged in picketing, their conduct would still not fall within the proscription of 8(b)(7)(A) unless their intent in picketing were recognitional or organizational. But the handbill which Hawkins and Hollins circulated refutes any such conclusion. The leaflet's message is plainly informational. It is an effort to tell others of racial discrimination at The Emporium and cannot sensibly be confused with picketing by a labor organization seeking recognition.

Thus, the object of the minority employees' picketing was not at all "to coerce the Company to bargain with them concerning conditions of employment . . . ." Brief for the N.L.R.B., p. 38. Rather, it was to disseminate information about racial discrimination at The Emporium, a condition which was in direct violation of the anti-discrimination clause of the collective bargaining agreement (see note 6, *supra*) and of Title VII of the Civil Rights Act. While it is true that the two blacks hoped to talk with the president of The Emporium about racial discrimination (Pet. App., p. 8), it is grossly inaccurate to characterize this as an attempt "to coerce the Company to bargain with them concerning conditions of employment."[40] By strict adherence to the collective bargaining provision which prohibited racial discrimination in "hire, tenure or job status", the company would have satisfied totally the demands of Hollins and Hawkins. The company's duty was unambiguous. No negotiation was necessary to clarify the terms of the collective bargaining agreement or the mandate of the Civil Rights Act. Hollins and Hawkins were not seeking, and accession to their requests did not require, a "continuing relationship" with the company. *Dallas Bldg. & Constr. Trades Council v. N.L.R.B.*, 396 F.2d 677, 683 (D.C. Cir. 1968).[41]

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[40]Brief for the N.L.R.B., p. 38. But see, Decision of N.L.R.B., Pet.App., p. 58, n.4 (Jenkins, dissenting).

[41]This case is therefore factually distinguishable from *Dallas Building*, in which an outside labor organization, a construction trade council, demanded an agreement with a construction employers' association which would have required the association to subcontract exclusively with locals affiliated with the council. In none of the agreements which the association then had with

Were this Court to hold that Hawkins and Hollins had violated Section 8(b)(7)(A), that provision would have been expanded far beyond the meaning ascribed to it by Congress, and an essential distinction between two forms of picketing will have been disregarded. As the National Labor Relations Board said in what is perhaps its leading case interpreting Section 8(b)(7)(A):

> We might well concede that in the long view all union activity, including strikes and picketing, has the ultimate economic objective of organization and bargaining. But we deal here not with abstract economic ideology. Congress itself has drawn a sharp distinction between recognition and organization picketing and other forms of picketing, thereby recognizing, as we recognize, that a real distinction does exist. *C. A. Blinne Constr. Co.*, 135 N.L.R.B. 1153, 1168, n.29.[42]

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council-affiliated locals were there subcontracting clauses. Thus, the demand of the association for a *new* and basic contract term could not be met without some form of negotiation, perhaps of some duration. This clearly is not the situation in the present case, where two employees were seeking compliance with an *existing* clause of a collective bargaining agreement.

Similarly distinguishable are two other cases relied upon by the government (Brief for the N.L.R.B., p. 38, n.17), *Centralia Bldg. Trades Council v. N.L.R.B.*, 363 F.2d 699 (D.C. Cir. 1966) and *National Packing Co. v. N.L.R.B.*, 377 F.2d 800 (10th Cir. 1967). In both cases, as in *Dallas Building*, the picketing labor organization made demands which would have involved both the establishment of a continuing negotiating relationship between the two parties and the alteration of the existing terms of employment.

[42]See also *Houston Bldg. & Constr. Trades Council*, 136 N.L.R.B. 321 (1962) (picketing for area standards does not violate Section 8(b)(7)(A) because the employer is not required to recognize or bargain with the labor organization); *Fanelli Ford Sales, Inc.*, 133 N.L.R.B. 1468 (1961) (picketing directed at securing reinstatement of discharged employee does not violate Section 8(b)(7)(A)).

III. SINCE THE MINORITY EMPLOYEES' OPPOSITION TO EMPLOYMENT DISCRIMINATION IN THIS CASE SO MINIMALLY AFFECTED THE COLLECTIVE BARGAINING PROCESS, THEIR CONDUCT REQUIRED PROTECTION UNDER THE ACT.

As shown in the previous argument, *supra*, the employees' activity in this case did not constitute either bargaining or an attempt to bargain and, therefore, did not invoke the strictures of Section 9(a) exclusivity. But, even if Section 9(a) were deemed applicable, the employees' concerted activities nonetheless were entitled to the protection of the Act. This is so because Section 7 rights exercised to eliminate employment discrimination enjoy a special solicitude within the structure of federal labor policy.[43] Given this legal framework, the record makes plain that the employees' conduct impinged so slightly, if at all, upon the legitimate interests of either the Union or the employer that Section 9(a) principles do not deprive them of the Act's protection.

A. Section 7 of the Act Requires That Exclusivity Principles Be Subordinated to the Paramount Importance of the Minority Employees' Objectives.

Section 9(a) principles cannot be viewed in a vacuum. *E.g., Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942). Instead, effectuation of the national labor policy in general, and Section 7 rights in particular, requires that exclusivity principles be applied in light of the overriding federal objective to

[43] As the Court of Appeals stated:

> [C]oncerted activity involving racial discrimination ha[s] a unique status in that the subject matter has independent statuory bases . . . (Pet. App., p. 20).

eliminate racial discrimination in employment. Thus, the fact that Hollins and Hawkins were exercising paramount constitutional and statutory rights, not simply a contract right, has profound implications in the accommodation of Section 7 and Section 9(a) interests under the Act. The balancing process shifts substantially in such a case.

A recent decision of this Court, *N.L.R.B. v. Magnavox Co. of Tennessee*, 94 S. Ct. 1099 (1974), illustrates the principle well. In *Magnavox*, the collective bargaining agreement authorized a total ban on employee distribution of literature on all of the employer's property at all times. This Court sustained the union's subsequent challenge to the no-distribution contract provision to which the Union previously had agreed, because the ban "might seriously dilute §7 rights." *Id.* at 1102. This Court held that it was not within "the powers of the collective-bargaining representative to waive those rights." *Ibid.*[44] Conflicting interests were balanced to effectuate national labor policy, and statutory rights, expressing important Congressional policy, displaced contractual arrangements. The present case calls for exactly the same result.

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[44] As Mr. Justice Stewart recognized in his separate opinion in *Magnavox:*

> Although the union is deemed to represent all employees in the bargaining unit, both pro-union and anti-union, and may waive important §7 rights in the course of collective bargaining, presumably in return for management concessions on other fronts, this authority cannot extend to rights with respect to which the union and the individual employees have essentially conflicting interests. *N.L.R.B. v. Magnavox*, 94 S.Ct. 1099, 1103 (1974) (concurring in part and dissenting in part).

Hawkins and Hollins, of course, were exercising statutory, if not constitutional, rights of the "highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Accordingly, it would be illogical in the extreme if contractual arrangements by the parties, which added nothing to pre-existing rights of such weighty origin, were able to waive or preclude their exercise. Similarly, given that Congress has specifically prohibited discrimination by either an employer or union (Section 703 of Title VII, 42 U.S.C. § 2000e-2), it would be even more incongruous to accord exclusivity principles a paramount position when racial employment discrimination exists. But such would be the result if the two employees' activities were deemed to contravene Section 9(a). While exclusivity and encouragement of contractual grievance processes are not to be disregarded, neither may they be seized upon to prevent the elimination of discrimination.

Other decisions of this Court safeguard the primacy of important statutory rights in the face of efforts by private parties to defeat them or simply to effectuate them differently. In *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971), for example, this Court held that a statutory remedy for seamen's wages claimed could not be abrogated by a contractual arbitration process. It was urged in that case, as it is in this one, that union prestige, employer convenience and policy favoring private settlement of disputes were endangered, but this Court declined to strip individual seamen of their statutory rights. *See also*

Alexander v. Gardner-Denver Co., 94 S. Ct. 1011 (1974).

Moreover, in *Mastro Plastics v. N.L.R.B.*, 350 U.S. 270 (1956), employees subject to a contractual no-strike provision were protected when they struck in response to their employer's unfair labor practices which were destructive of the "foundations" of the bargaining contract. Recognizing the high priority which Congress has accorded the elimination of racial discrimination, the employees in the present case, *a fortiori,* should be protected by the N.L.R.A. for their concerted effort to achieve this goal. Gould, *Black Power in the Unions: The Input on Collective Bargaining Relationships,* 79 Yale L. J. 46, 55-56, 69-70 (1969).

B. The Record Shows That the Employees' Conduct Impinged Slightly, If At All, Upon the Possible Legitimate Interests of Either the Union or the Employer.

In light of the considerations discussed in subsection A, *supra,* it would be anomalous, indeed, to penalize Hawkins and Hollins, under the guise of deference to Section 9(a) principles, simply because their Union's collective agreement contained non-discrimination and dispute settling provisions. Moreover, the cases recognize the comparative insignificance of general non-discrimination pledges unaccompanied by vigorous efforts of both union and management, in fact, to eliminate discriminatory practices. These were precisely the kinds of efforts which were absent in this case and which necessitated the employees' abandonment of the contractual dispute settling ma-

chinery.[45] *United Packinghouse Workers Union v. N.L.R.B.*, 416 F.2d 1126, 1132, n.10 (D. C. Cir.), *cert. denied*, 396 U.S. 903 (1969); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12, 14 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); Note, *Title VII and N.L.R.A.: Protection of Extra-Union Opposition to Employment Discrimination*, 72 Mich. L. Rev. 313, 321 (1973). Under these circumstances, Section 9(a) prohibits only those activities which substantially endanger possible legitimate union and employer interests. In this case, the lower court found that the minority employees' activities had no such impact (Pet. App., p. 24).

1. Impact on Possible Legitimate Union Interests.

There can be little dispute with the lower court's finding that, given the singular nature of the employees' objective, any interference with Section 9(a) principles which the employees may have caused was minimal and legally tolerable (Pet. App., p. 24). The court observed, first, that Hawkins and Hollins had earnestly attempted to utilize their Union, abandoning

[45]In fact, that machinery produced exactly the kind of counter-productive effect which the employees anticipated. Thus Hawkins testified as to their concern that "if we talked as individuals, well, they could only have a few cases, they would satisfy a few" (Pet. App., p. 7, n.12). That is precisely what happened: one, perhaps two, minorities did receive promotions. Minorities as a class benefitted not at all; systemic discrimination continued. Ironically, the Board's Trial Examiner seized upon these two promotions to state that there was only insubstantial discrimination at the store (*id.* at 92) and to find that "[a]ll the evidence indicates that the Union . . . was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention . . ." (*Id.* at 103).

it only when futility was apparent. *Ibid.*[46] Both the lower court in this case and the Ninth Circuit Court of Appeals have found Section 9(a) principles to commend initial utilization of union processes even where the employees' complaint involves racial discrimination. *Ibid.; N.L.R.B. v. Tanner Motor Livery, Ltd.*, 419 F.2d 216, 221 (9th Cir. 1969).

However, in analogous situations, this Court has not required that even contract grievances, much less statutory rights, be pursued under the contract where the pursuit is obviously futile. In *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965), this Court noted the general rule that "employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure . . ." (emphasis in original). But, this Court went on, the rule may no longer obtain in the event that the union refuses to press or only perfunctorily presses the claim. And, in *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969), this Court excused an employee from the rigid exhaustion requirements of the Railway Labor Act where both the union and employer had manifested hostility to the claim of racial discrimination. This Court stated that it "would be absolutely futile" for the employee in that situation to continue to "*attempt* to exhaust contractual remedies." *Id.* at 331 (emphasis in original). *See Petersen v. Rath Packing Co.*, 461 F.2d 312, 315 (8th Cir. 1972).

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[46]To the extent that Section 9(a) imposes an exhaustion-of-remedies requirement, it is settled that exhaustion normally is not demanded where civil rights are at stake. *E.g., Damico v. California*, 389 U.S. 416 (1967).

Futility in the instant case was no less demonstrable. The employees waited seven months for even the possibility of a meaningful remedy for discrimination. Then, the grievance mechanism finally provided—the meeting of the adjustment board—proved to be structured so that effective response to their complaint was utterly impossible. Further deference to the contractual grievance machinery simply was both useless and unjustified.

Secondly, the Court of Appeals recognized that the Union and employees, in fact, were not at cross purposes (Pet. App., pp. 25-26). The Union's official position endorsed the employees' objective which, in turn, related to the non-discrimination provision in the union-management contract. Both the Union and the employees recognized the need to eradicate racially discriminatory practices at The Emporium.[47] The Union's willingness to meet with and hear the minority employees' complaints, its communications to management, its efforts to adjust two individual problems and its filing of grievances after the employees' discharges: from all these facts, Union concurrence with the employees must be inferred.

Whatever doubt persists that the minority employees' activities may have jeopardized the Union's interests is dispelled wholly by the Union's *amicus* appearance before this Court. Amicus Curiae Brief of Department Store Employees Union, Local 1100

[47]Indeed, the court—relying on *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) and *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, *supra*—noted that any contrary stance of the Union would have been unlawful (Pet. App. p. 26, n.38).

(August 1974). That brief unequivocally supports Hawkins and Hollins and unequivocally disposes of any contention or conjecture that the Union felt, was, or has been undermined by the employees' efforts. The Union's brief first recognizes the uncontested facts that the employees initially went to the Union and, for a substantial time, "worked solely within the Union in dealing with the problem of discrimination." *Id.* at ..... The Union in fact commends Hollins and Hawkins because

> to a certain extent they were central figures initiating action which brought the problem of discrimination to the attention of both the Union and Company. *Ibid.*

Indeed, the Union credits the two minority employees since "as a result of their activity, it became the Union's official position that the Company engaged in racial discrimination." *Ibid.*[48] As the Union brief recognizes, the facts here "set this case miles apart from many of those in which a union's action demonstrated open conflict with the minority employee group." *Ibid.*[49]

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[48]The Union's brief points out two other important considerations demonstrating the close nexus between the Union and employees' positions. First, Hawkins' and Hollins' activities were neither in breach of any provision of the collective bargaining agreement nor "disrupt[ive of] the on-going relationship between the Company and Union." Amicus Curiae Brief of Union, p. ..... Secondly, the Union acknowledged "that the two employees' refusal to participate in the on-going grievance process *created no disruption* to the bargaining relationship." *Ibid.* (emphasis added).

[49]For the same reasons, the "wildcat" and "schism" cases upon which the government relies are plainly inapposite. As an initial matter, none of them involves employee activity of such overriding national significance as the employees' objective here. See-

Under the circumstances present here, then, it is idle to speculate about imagined dangers which the employees' remarkably innocuous leafletting may have caused to abstract exclusivity principles or to the general union movement. See *e.g.*, Brief for the N.L.R.B., pp. 21-23; Recent Cases, 87 Harv. L. Rev. 656 (1974). These fears have no relation to the realities of this case. The Union's brief to this Court and the facts in the record dramatically refute such fears. The more prevalent and profound danger is the persistence of racial discrimination in employment.

2. Impact on Possible Legitimate Employer Interests.

Even when examined from the employer's perspective, the minority employees' activities did not impinge upon any substantial legitimate interest of The Emporium. Several important principles compel this conclusion. First, the cases, as well as the statutes, *e.g.*, Title VII, make it clear that employers not only have a duty to provide equal employment opportuni-

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ondly, the line of "derogation" cases (Brief for the N.L.R.B., pp. 18-20), which followed *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) and *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969), concerns internal union affairs and discipline, issues not presented in this case. *Cf., N.L.R.B. v. International Brotherhood of Electrical Workers*, 42 U.S.L.W. 5059 (U.S. Sup. Ct., June 24, 1974).

Nor are *N.L.R.B. v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944) and its line of cases applicable. Brief for the N.L.R.B., pp. 19-20. In *Draper* the employees attempted to usurp the union's role by engaging in a wildcat strike during the course of bargaining negotiations. There could be no time nor action more critical to the fundamental purpose of a union. And the court characterized the employees' actions there as irresponsible. By complete contrast, Hollins and Hawkins could hardly be thought irresponsible. They reluctantly undertook separate action, peacefully and unobtrusively, in a manner calculated least to interfere either with the Union's reputation and role or with the operation of their employer's business.

ties to their minority employees, but that this duty can be breached though the employer never intended to design or even to perpetuate discriminatory conditions. *E.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Secondly, where such discrimination exists, the employer, even though party to a collective bargaining contract, can be compelled unilaterally to eliminate discrimination. *E.g., Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522 (W.D. Pa. 1973); *U.S. v. Local 189, Papermakers*, 282 F. Supp. 39, 42-44 (E.D. La. 1968), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Moreover, collective bargains are no obstacle to the fashioning of relief to end discrimination.

> [W]hatever contractual agreement may exist between the company and [the union] in the form of a collective bargaining agreement cannot and does not preclude the implementation of [effective relief]. *United States v. Bethlehem Steel Corp.*, 5 E.P.D. ¶7988, at p. 6638 (W.D.N.Y. 1972).

It hardly comports with this description of an employer's unambiguous duties to hear The Emporium complain in this case that it was intolerably burdened by the employees' request to discuss the problem of racial discrimination at its store.[50] For one thing, Section 9(a) was intended simply to permit an employer to hear and adjust grievances without fear of a Section 8(a)(5) duty to bargain violation. The Emporium has not been charged with such activity. To the extent that Hawkins' and Hollins' purpose was to

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[50]Brief for The Emporium, pp. 7-9, 14-15 (May 1974).

present a grievance, Section 9(a) expressly authorized them to do so, and likewise authorized their employer to provide the parity for minority employees which they sought.

The Emporium was on notice, at least after it received the Union's April 11 report (Pet. App., p. 4; A. 108-113), that its employees and their Union demanded action to eliminate discrimination at the store.[51] The record in no way suggests that the company ever recognized any duty to take such action. Instead, what the company did was to discharge Hawkins and Hollins because of their leafletting in opposition to the discrimination.[52] For all of these reasons, the Court of Appeals refused to allow the company to discharge employees because those employees wished to persuade it to do what federal labor policy requires. This is most certainly not the sort of "conflicting demand" which the Section 9(a) principle was intended to preclude. As the lower court put it:

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[51]Indeed, the company could have informed itself of such problems had it chosen to examine its own periodically prepared EEO-1 reports. *E.g.*, A. 120; see also note 28, *supra*.

[52]The employees' conduct is admitted by all parties to have been peaceful, decorous and unobstructive. There is thus complete contrast between their leafletting and that of the employee in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). In that case the employee was guilty of criminal conduct, directed against his employer, which this Court called "deliberate" and "unlawful". 93 S.Ct. at 1825. Contrary then to the government's claim (Brief for the N.L.R.B., p. 40), whether the distinction be made between criminal and non-criminal, violent and non-violent, or disruptive and non-disruptive conduct, the considerations operative in *McDonnell Douglas* have utterly no relevance here.

> We can see nothing in that principle, however, which indicates that it was intended to be used as a shield to protect an employer from the "burden" of having to deal with two groups on the same subject. We cannot agree that any inconvenience which the Company might experience in being required to bargain with the minority here while still participating in the grievance procedures justifies withdrawing Section 7 protection from these concerted activities (Pet. App., p. 29).

IV. AFFIRMANCE OF THE DECISION BELOW RECOGNIZES THE N.L.R.B.'S DUTY AND ABILITY TO ELIMINATE RACIAL DISCRIMINATION IN EMPLOYMENT.

Much of the government's brief in this case is devoted to asserting the impropriety of the Labor Board's involvement in—and its inability to effect—the elimination of racial discrimination in employment. This contention would seem to echo the Trial Examiner's unfortunate parenthetical statement: "we do not belong in the contemporary civil rights struggle. Congress did not put us there" (Pet. App., p. 101). Precisely the opposite is true: the N.L.R.B. must assume its responsibilities in the implementation of federal labor policy, as the previous discussion, the cases and the decision of the Court of Appeals here all demand. *E.g., Southern Steamship Co. v. N.L.R.B., supra.*

Furthermore, the lower court has shown that implementation of this overriding mandate, and the administration of the N.L.R.A. within the context of this

mandate, can be accomplished comfortably by a balancing of different provisions within the Act.[53] While the petitioners' briefs conjure up a myriad of obstacles which supposedly prevent N.L.R.B. engagement in effectuation of this mandate, respondents' argument in this section of their brief demonstrates that these hypothetical problems bear no relationship to this case.

A. The Availability of Alternative Remedies Neither Prevents, Nor Diminishes the Desirability of, the Board's Role in Eliminating Employment Discrimination.

In their briefs, petitioners strongly contend that Hawkins and Hollins could not invoke the protection of the Labor Act because of the availability of other remedies for employment discrimination. Brief for the N.L.R.B., pp. 26-29; Brief for The Emporium, p. 5. Unaccountably, petitioners fail to perceive the principles articulated last term in this Court's unanimous opinion in *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011 (1974). That decision provides compelling authority that, when an individual acts to vindicate the important congressional policy against discriminatory employment practices, the availability of one remedy or forum does not preclude resort to another. Thus, this Court reversed lower court decisions preventing an employee, whose racial claim had been

[53]Senior District Judge Wyzanski, in his separate opinion, rejects the majority's balancing of Sections 7 and 9(a). He would find the policy against discrimination so compelling, and the likelihood of union-management effectuation of that policy so unlikely, that Section 9(a) principles must give way to authorize minority demands (Pet. App., pp. 31-53). See also Gould, *supra*, 79 Yale L.J. 46 (1969); Note, *supra*, 72 Mich. L. Rev. at 320, 321, 325 (1973).

fully arbitrated adversely to him, from subsequently bringing that claim into court. The lower courts had relied upon "notions of election of remedies and waiver and [on] the federal policy favoring arbitration of labor disputes," *id.* at 1018, but such reliance was misplaced.

This Court found such notions largely inapplicable to this field, in which Congress has "evinced a general intent to accord parallel or overlapping remedies against discrimination." *Id.* at 1019. As this Court noted, the legislative history demonstrates the congressional intent to provide independent, and even successive, forums for discrimination remedies under the numerous applicable state and federal enactments. The debates not only imply congressional intent to provide alternative remedies for employment discrimination, but expressly single out the N.L.R.A. as one of those remedies still in place after enactment of Title VII.[54] Moreover, given this Court's decision in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), Hawkins and Hollins could clearly have invoked the protection of Section 704(a) of Title VII had they sought their remedy under that Act. To deny them relief in this case could only mean that the N.L.R.A. affords them no similar protection. Yet, not only do judicial and Congressional statements require N.L.R.B. protection of claims based on racial

[54]See note 24, *supra.* The courts of appeal also have concluded that the N.L.R.B. retains jurisdiction and responsibility over claims of employment discrimination on racial grounds. *E.g., Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979, 996-997 (D.C. Cir. 1973); *United Packinghouse Workers Union v. N.L.R.B., supra,* 416 F.2d at 1133, n.11.

discrimination, of the kind present in this case, but there are persuasive policy considerations that lead to the same result.

1. Administrative Handicaps Militate Against Exclusive Reliance on Title VII Remedies in All Cases of Employment Discrimination.

The government has urged that Hawkins and Hollins should be denied the Act's protection because Title VII provides a sufficient remedy for employment discrimination. Brief for the N.L.R.B., pp. 27-28. Respondents agree that the employees' discharges, in addition to violating N.L.R.A. Section 7, were expressly prohibited by Section 704(a) of Title VII. But, as *Macklin v. Spector, supra,* 478 F.2d at 996, indicates, E.E.O.C. processes should not be regarded as the "centerpiece of the nation's commitment to ending unfair discrimination in employment and a *sine qua non* in all employment discrimination cases." *Accord, Alexander v. Gardner-Denver Co.,* 94 S. Ct. 1011, 1018 (1974).

E.E.O.C. processes are slow and becoming slower. Its caseload is increasing at an accelerating rate. More than three years ago, its backlog was 32,000 cases; charges customarily require two years to be processed. Note, *supra,* 72 Mich. L. Rev. 313, 320, n.47. Court delay, combined with this administrative backlog, seriously impair the value of E.E.O.C. remedies.[55]

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[55]One authority, having noted the E.E.O.C.'s lack of cease-and-desist power, goes on to observe:

> Primarily because the N.L.R.B. bears the expenses of enforcement of the N.L.R.A., offers the other general advantages of administrative enforcement, has a backlog time before the N.L.R.B. six months shorter than before the federal district

2. The Heavy Burden of Proof in Establishing a Breach of the Duty of Fair Representation Renders Such Suits An Illusory Remedy for Employment Discrimination.

The government's suggestion that minority claims may be remedied by proof that their union has breached its duty of fair representation is equally unsatisfactory. Brief for the N.L.R.B., pp. 26-27.[56] The duty of fair representation under L.M.R.A. Section 301 imposes on an exclusive bargaining agent the statutory duty to serve those it represents fairly, honestly, in good faith and without hostility. *E.g., Humphrey v. Moore,* 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953). The duty, however, does not reach all meritorious claims of an aggrieved member, for "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . . ." *Ford Motor Co. v. Huffman, supra,* 345 U.S. at 338. Indeed, the claimant must prove not only the merits of his case, but also must affirmatively show that the union was acting in bad faith. *Vaca v. Sipes,* 386 U.S. 171

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courts, and has no express requirement to defer to state [Fair Employment Practices] agencies, representatives of civil rights organizations have preferred N.L.R.B. enforcement over Title VII enforcement . . . . Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Inter-agency Relations,* 34 Geo. Wash. L. Rev. 846, 887 (1966).

[56]Respondents emphasize that this case was not litigated, nor is it now presented, on a duty of fair representation theory. The Court of Appeals' decision does not rest upon that basis, either. In fact, the case presents the issue of whether the N.L.R.B. is an available forum for claims of racial discrimination when the union (1) has been asked, but was unable, to provide an effective remedy for discrimination, and (2) is *not* charged with having, or proved to have, breached its duty of fair representation.

(1967).[57] As this Court itself recognized last term in *Alexander v. Gardner-Denver:*

> A breach of the union's duty of fair representation may prove difficult to establish. See *Vaca v. Sipes; Humphrey v. Moore.* In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers. 94 S. Ct. at 1025, n.19 (citations omitted).

Employer discrimination is no less tractable to remedy by means of a Section 301, 29 U.S.C. §185, suit. To establish a breach of contract, the employee must first overcome the not insubstantial hurdle of proving a breach of the union's duty of fair representation. *Vaca v. Sipes, supra.* Such a requirement may shield the employer from liability for acts of discrimination. *Id.* at 203-205 (Mr. Justice Black, dissenting); *cf., Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 129 (6th Cir. 1971); Gould, *Labor Arbitration of Grievances Involving Racial Discrimination,* 118 U. Pa. L. Rev. 40, 42-43 (1969).

3. The Inherent Deficiencies of Arbitration Preclude Reliance Upon It as An Exclusive Remedy for Employment Discrimination.

The government also argues that Hawkins and Hollins should have been restricted to pursuit of their contractual remedy: arbitration. Brief for the N.L.R.B., p. 26. This assertion is the inevitable conclusion of petitioner's Section 9(a) exclusivity argu-

[57] The test is no less rigorous when the claim is raised as a Section 8(b)(1)(A) unfair labor practice under the N.L.R.A. *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12 (5th Cir. 1966).

ment, which maintains that individuals are to be remitted to the rights and remedies gained—and dispensed—by the union.

This brief previously has demonstrated the inapplicability of exclusivity to minority employees' claims. See Section II, subsection A, *supra*. It has also shown this Court's refusal to relegate important federal rights to determination by private parties. *E.g., N.L.R.B. v. Magnavox Co. of Tennessee*, 94 S. Ct. 1099 (1974); *U.S. Bulk Carriers v. Arguelles*, 400 U. S. 351 (1971). The inherent limitations of arbitration of racial claims are fully explored in *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011, 1022 (1974). If the arbitral decision is based on the collective bargaining agreement, from which the arbitrator's authority emanates, the minority employees' federal right—to be free from discrimination—may well go unenforced. If the arbitrator chooses the other course, attempting to construe statutory rights, then he has departed from his charter and the award is unenforceable. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Commentators have elucidated the insurmountable institutional deficiencies of industrial arbitration in dealing with minority claims. Professor Gould has described many such defects. First, the arbitrator is necessarily responsive to the union and management which selected him, although they are often—as in this case—alleged to have caused, or at least tolerated, the discrimination. Unfortunately, minority workers generally are not allowed to intervene. Moreover,

"class" problems normally are not susceptible of arbitrable solution, as Hawkins and Hollins were keenly aware. Arbitration is ill-equipped to implement extra-contractual rights. Gould, *supra,* 118 U. Pa. L. Rev. 40, 46-52 (1969).[58]

Despite this heavy weight of authority, the government urges this Court to confine minority claimants to contractual arbitration processes whenever (1) the collective bargaining agreement bars discrimination[59] and (2) the union is making a good faith effort to process the grievance. Brief for the N.L.R.B., p. 36. What the second condition requires, however, is not simply good faith, but nearly unprovable bad faith. *Vaca v. Sipes,* 386 U.S. 171 (1967). Nothing less than demonstrable hostility is sufficient. The practical result of this requirement would be to stifle all minority claims whenever the majority of workers had selected a union and the union had agreed to a standard non-discrimination provision.

The Emporium argues for even more. Indeed, the company would prohibit activities of the kind involved in this case, because "[t]he subject of discrimination

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[58]*Accord,* Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination,* 39 U. Chi. L. Rev. 30 (1971); Blumrosen, *Labor Arbitration, EEOC Conciliation, and Discrimination in Employment,* 24 Arb. J. 88 (1969); Comment, *Policy Conflict: Should An Arbitration Award Be Allowed to Bar a Suit Under Title VII of the Civil Rights Act of 1964?,* 20 U.C.L.A. L. Rev. 84 (1972); Bennett, *Labor Law Meets Title VII: Remedies for Discrimination in Employment,* 6 Conn. L. Rev. 66 (1973).

[59]Probably more than 50 percent of collective agreements currently in effect expressly proscribe such discrimination. Comment, *supra,* 20 U.C.L.A. L. Rev. 84, 85, n.6 (1972). Nearly all agreements provide for arbitration. *Id.* at 85, n.7.

had already been considered in collective bargaining and resulted in a contract provision forbidding discrimination." Brief for The Emporium, p. 11. Under this test, minority claims would be stifled at least through the term of the collective agreement. Plainly, the Congress did not intend this result.

2. The Board is Well-Equipped to Assume the Role of Eliminating Racial Discrimination in Employment.

The decision of the Court of Appeals in this case requires the N.L.R.B. to assume its duty to effectuate, under the Act, the broad, compelling federal policy to eliminate racial discrimination in employment. Not only does Board assumption of this duty have sound policy justification (*United Packinghouse Workers Union v. N.L.R.B., supra,* 416 F.2d at 1133, n. 11) but the Board, with its labor relations expertise, is well suited to perform the balancing test which the court has prescribed. Thus, in *Bekins Moving & Storage Co. of Florida, Inc.,* 211 N.L.R.B. No. 7 (June 11, 1974), the Board—in determining that it henceforth would refuse to certify unions which had won a representation election, without examining claims that the union practiced racial discrimination—considered whether to issue rules to define the parameters of that examination. The Board concluded that "we are not yet sufficiently experienced in this newly developing area of the law" to establish such rules. *Bekins, supra,* at p. 11 of the slip opinion. The Board, therefore, adopted the following procedure:

> It will thus be our task, on a case-by-case basis, to determine whether the nature and *quantum* of the

> proof offered sufficiently shows a propensity for unfair representation as to require us, in order that our own action may conform to our constitutional duties, to take the drastic step of declining to certify a labor organization which has demonstrated in an election that it is the choice of the majority of employees. . . . To reconcile these views with a full awareness of our own constitutional responsibilities will, we recognize, not always be an easy task, but the difficulties involved do not entitle us to shrug off our oath to uphold and defend the Constitution of the United States. *Id.* at pp. 6-7.

In *Bekins,* then, in the face of strong considerations of majoritarian principles, the Board undertook to evaluate, on a case-by-case basis, the substantiality of claims of racial discrimination. Precisely this same approach is required by the Court of Appeals' decision here. In the present case, the Board might have examined (1) the employer's truculence, (2) the Union's inability to provide an effective remedy, (3) the employees' good faith and (4) the degree of their interference with the employer's business and the union's legitimate role. Note, *supra,* 72 Mich. L. Rev. 313, 328 (1973).

In other contexts, the courts and the Board have not hesitated to implement the purposes of the Act through case-by-case development of broad duties which are not susceptible of simple articulation. For example, since 1944, successive decisions have refined and applied the principle contained in the phrase "duty of fair representation" to the vast spectrum of

factual situations which present themselves to an administrative agency. *N.L.R.B. v. Mansion House Center Management Corp.*, 473 F.2d 471, 477 (8th Cir. 1973); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 1823-1826 (1973).

Finally, Board administration of the standards articulated by the Court of Appeals will have the inevitable and important effect of encouraging union and management to be more responsive to the grievances of minority groups.[60] This may, as Professor Gould suggests, take the form of creating "special machinery which will bring dissident [minority] workers into the collective bargaining process." Gould, *supra*, 79 Yale 46, 84 (1969).[61] In any event, adherence to the Court of Appeals' approach will minimize disruption and effectuate the important goal of industrial stability.

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[60]As the Union's brief states, affirmance of the decision below "serves to encourage dissident employees to pursue their disputes within their own labor organization with some flexibility for divergence in approaches." Amicus Curiae Brief of Department Store Employees Union, Local 1100, at p. .....

[61]Tripartite discussion of minority complaints has been recommended by other authorities. *E.g.*, Blumrosen, *supra*, 24 Arb. J. 88 (1969), who analogizes to E.E.O.C. conciliation processes, where all three parties—minority claimants, union and management—are represented. *Id.* at 99-105. Indeed, had The Emporium wished to respond to Hawkins' and Hollins' complaint other than by discharging them, it could have requested the E.E.O.C.'s "technical assistance" to further its "compliance" with Title VII purposes. Section 705(g)(3) of Title VII, 42 U.S.C. § 2000e-4(g)(3); see also Sections 705(g)(4) and (5), 42 U.S.C. §§ 2000e-4(g)(4) and (5).

If the employees' activities were characterized as a grievance, tripartite discussion would have been practicable. N.L.R.A. Section 9(a) authorizes presentation and adjustment of employee grievances by employers and provides for the union's presence at such a presentation.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Dated, August, 1974.

Respectfully submitted,

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